

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

MARC SOBEL)

Applicant for Certain Part 90 Authorizations)
in the Los Angeles Area and Requestor of)
of Certain Finder's Preferences)

MARC SOBEL AND MARC SOBEL)
d/b/a AIR WAVE COMMUNICATIONS)

Licensee of Certain Part 90 Stations in the)
Los Angeles Area)

To: The Commission)

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WT DOCKET NO. 97-56

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FURTHER MOTION FOR LEAVE TO FILE SUPPLEMENT EXCEPTIONS

Marc D. Sobel d/b/a AirWave Communications ("Sobel"), by his attorney, hereby respectfully moves for leave to supplement his pending *Consolidated Brief and Exceptions* in the captioned matter, for the purpose of addressing the significance of the recent Commission decision in *Rainbow Broadcasting Co.*, FCC 98-185, released August 5, 1998. For the reasons stated below, the Commission ruling in *Rainbow*, like the Court ruling in *Lutheran Church-Missouri Synod v. FCC*, No. 97-1116 (D.C. Cir. Apr. 14, 1998),¹ has a direct bearing on issues central to this case and should therefore be briefed by the parties.

The Bureau's charges against Sobel are that (a) the December 1993 management agreement constitutes an unauthorized transfer of control of Sobel's stations to Kay; and (b) a January 1994 affidavit signed by Sobel constitutes misrepresentation and/or lack of candor because (allegedly) it inaccurately characterized the Sobel/Kay relationship. Sobel has urged that, even assuming a transfer of control and even further assuming technical inaccuracies in the affidavit, disqualification is unwarranted because Sobel did not intend to violate the rules and did not act with deceptive intent.

A strong indication that Sobel did not act knowingly and intentionally is the extent to which legal counsel was involved in the drafting of both the management agreement and the affidavit. Sobel relied on specialized communications counsel to assure that the management agreement complied with FCC requirements. Only a few short months later, that same legal counsel drafted the affidavit for Sobel's signature. It is inconceivable that legal

¹ On May 28, 1998, Sobel filed a *Motion for Leave to File Supplement to Consolidated Brief and Exceptions* in which he sought leave to supplement his exceptions to address the applicability of a recent *Lutheran Church*. The Commission has not acted on that request.

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counsel would prepare for Sobel's signature an affidavit that misrepresented the terms of an agreement drafted by that very same counsel only weeks earlier. Even making the fantastic assumption that Sobel's legal counsel prepared an illegal agreement and shortly thereafter prepared a false affidavit for Sobel's signature, Sobel was not aware of this and acted reasonably in relying on the advice and actions of counsel. *See, generally, Consolidated Brief and Exceptions* at pp. 5, 18, 23. Sobel also argued that, even assuming he is guilty of some transgression, disqualification and revocation of all his licenses is an inappropriately harsh sanction. *Id.* at p. 25.

In *Rainbow* the Commission was confronted with the issue whether a violation of the ex parte rules by legal counsel should be attributed to the licensee and, if so, what impact that should have on the licensee's basic qualifications. The Commission opined as follows:

Although applicants are bound by the acts of their agents, *see Carol Sue Bowman*, 6 FCC Rcd 4723 P4 (1991); *Hillebrand Broadcasting Corp.*, 1 FCC Rcd 419, 420 n. 6 (1986), and it is axiomatic that they are responsible for knowing and complying with the Commission's rules, these principles do not warrant disqualification of the applicant here. There is no doubt that the violations actually occurred and are attributable to *Rainbow*. Nevertheless, the applicant's knowledge of the misconduct is a highly relevant factor in determining whether disqualification is appropriate. *Centel Corp.*, 8 FCC Rcd 6162 (1993), *petition for review dismissed sub nom. American Message Centers v. FCC*, No. 93-1550 (D. C. Cir. Feb. 28, 1994), rehearing denied (May 25, 1994) (carrier not disqualified, despite multiple ex parte violations, where two of the violations were inadvertent and unintentional, and others involved reasonable belief contacts were permissible); *see also Voice of Reason, Inc.*, 37 FCC 2d 686, 709 (Rev. Bd. 1972), *recon. denied*, 39 FCC 2d 847, *rev. denied*, FCC 74-476, released May 8, 1974. Significantly, even where intentional ex parte misconduct has been found, the Commission has declined to disqualify applicants where, as here, the incidents were isolated events in the course of a long proceeding. *See Pepper Schultz*, 4 FCC Rcd 6393, 6403 (Rev. Bd. 1989), and cases cited therein, *rev. denied*, 5 FCC Rcd 3273 (1990); *see also Desert Empire Television Corp.*, 88 FCC 2d 1413, 1417 (1982) (imposing only modest monetary forfeiture where licensee engaged in willful and repeated ex parte communications on at least three separate occasions). The applicant's conduct here is far less egregious. ... [T]he present record and Commission precedent do not warrant disqualification of *Rainbow* or denial of its applications. We, however, issue an admonishment to *Rainbow* to exercise caution in complying with the ex parte rules.

Rainbow Broadcasting Co., slip op. at ¶ 18 (underlined emphasis added).

The Commission decision in *Rainbow*, like the Court's opinion in *Lutheran Church*, was released after the close of the pleading cycle in connection with the appeal of the initial decision in this matter. *Lutheran Church* bears strongly on the matter under review because of its instruction regarding the finding of the requisite element of intent to deceive based on *post hoc* speculation regarding the interpretation of words of ambiguous meaning. *See Motion for Leave to Supplement Consolidated Brief and Exceptions* (filed May 28, 1998). *Rainbow* is also important to this case owing to its instruction on the extent to which reliance on the actions and advice of counsel bears on the crucial question of whether a licensee knowingly and intentionally engaged in any disqualifying misconduct. Revocation is

an extreme sanction, and Sobel should therefore be afforded the opportunity to fully brief the Commission of the relevance of both decisions.

WHEREFORE, it is respectfully requested that Sobel be granted leave to submit a supplement of no more than ten pages in length,² and to be limited to the applicability of the above-referenced Commission decision and Court of Appeals opinion, within ten days of an order by the Commission granting this motion.

Respectfully submitted this 2nd day of October, 1998.

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² In response to Sobel's earlier motion for leave, the Bureau suggested that five pages would be adequate to address the *Lutheran Church* case. It is therefore respectfully suggested that the parties be afforded ten pages in which to address both *Lutheran Church* and *Rainbow*

CERTIFICATE OF SERVICE

I, Robert J. Keller, counsel for Marc D. Sobel d/b/a Air Wave Communications, hereby certify that on this 2nd day of October, 1998, I caused copies of the foregoing *FURTHER MOTION FOR LEAVE TO FILE SUPPLEMENT TO CONSOLIDATED BRIEF AND EXCEPTIONS* to be sent by facsimile with follow-up by regular mail, to the officials and parties in WT Docket No. 97-56, as follows

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